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EXTERNALISING DUTCH PUBLIC SOCIAL CARE SERVICES: DEMARKING THE LINES BETWEEN PUBLIC CONTRACTS AND A NEW INSTRUMENT IN BETWEEN AUTHORISATION SCHEMES AND PUBLIC CONTRACTS

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Abstract

In the context of shrinking budgets and ageing population, local governments in the Netherlands continuously seek for suitable legal instruments to provide a range of high quality social care services to their citizens. Since the CJEU cases *Falk Pharma* and *Tirkkonen*, they are seemingly able to use a new instrument. It appears similar to the instrument of authorisation schemes but includes the award of public contracts in the literal meaning of its definition in EU Public Procurement Directive 2014/24/EU. In light of the European aim to promote the well-being of its people and to respond to current challenges in the social sector, the newly introduced criterion of a public contract, namely 'selection', requires clarification from an EU-law perspective. The methodology of this paper includes an analysis of the EU legal framework and case law of the CJEU.

1. INTRODUCTION

In May 2017, the Dutch Newspapers were made aware of the call from the Municipality of Rotterdam, who publicly plead for the abolition of the obligatory EU Public Procurement Directives[2] for the purchase of small scale social care services, youth protection provisions and community teams.[3] The Municipality argued that this procurement obligation disrupts the care relationships and the cohesion of community teams. The

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[2] By EU Public Procurement Directive in this paper is meant the current Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ EU*, L 94/65 ; Since the CJEU cases *Tirkkonen* and *Falk Pharma* are ruled under application of Directive 2004/18 sometimes is referred to this Directive, being: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ EU*, L 134/114.

[3] "De verplichte Europese aanbesteding verstoort zorgrelaties en trekt wijkteams in de zorg uit elkaar. Rotterdam wil ervan af", (translated title: The obligatory EU Public Procurement rules disrupt the care relationships and the cohesion of community teams in providing care. Rotterdam wants it to abolish), *NRC Handelsblad*, 3 May 2017.

news reports did not stand alone; the Association for Dutch Municipalities (*Vereniging van Nederlandse Gemeenten*) also confirmed that many municipalities struggle with the procurement of social care services. More recently, in February 2018, the application of public procurement law on the procurement of youth care was also heavily debated in the Dutch Parliament, which resulted in a similar call for change.[4]

The negative media coverages about the procurement of social care services started from 2015 onwards. At this time, the social care services system of the Netherlands underwent a substantial system reform.[5] A major event in this sense is the transition to provide the social care the closest to the citizens and to increase their self-reliance. This brought forward some issues, such as the centralised coordination and procurement of these services was devolved to local governments (social support, youth care, debt rescheduling). This was a completely new task for local public authorities and it is still not clear to them yet how to organise it properly. The law leaves a wide range of (legal) possibilities and a broad margin of discretion to organise social care, but tools on how to make the best choice between all of the existing possibilities are lacking. Continuous retrenchments in this sector were necessary because of shrinking budgets, which caused a lot of debate in society and was widely reported by the media.[6] Questions due to the ageing population play a role here as well: how to guarantee the availability of high quality services for future generations? Also the division of responsibilities between municipalities and care providers caused quite some turmoil.

To organise social care services, public authorities in EU Member States are free to choose between a plethora of legal instruments.[7] Subsidies, authorisation schemes, or 'in-house' organisation can be used, or

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[4] 6 February 2018, see especially the contributions of Kooiman (SP) en Westerveld (GroenLinks) and the response of the minister of Health, welfare and Sports (Volksgezondheid, welzijn en Sport), available via (in Dutch): https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/kamer_in_het_kort/gevolgen-decentralisatie-jeugd-ggz-besproken

[5] Social care services must be distinguished from the health care services that are medical in nature. Social care services are the part of the health care services which do not relate to 'cure' (i.e. healthcare given by hospitals), but relate to 'care' (i.e. care and guidance to limit the disadvantages of illness, disabilities and elderly. In the Netherlands it also includes youth care.

[6] See for example: 'Gemeenten houden miljoenen zorggeld over' (translated title: Municipallities save millions for social care); via: http://nos.nl/artikel/2103303-gemeenten-houden-miljoenen-zorggeld-over.html; 'Meeste gemeenten houden geld over op zorgbudget' (translated title: Most municipalities save money on social care budget), via: http://www.volkskrant.nl/wetenschap/meeste-gemeenten-houden-geld-over-op-zorgbudget~a4295464/; And see: 'Gemeenten houden fors over op zorg' (translated title: Municipalities save substantially on social care budgets) via: http://www.binnenlandsbestuur.nl/financien/nieuws/gemeenten-houden-fors-over-op-zorg.9529724.lynkx; 'Gemeenten houden 310 miljoen over van WMO-budget' (translated title: Municpallities save 310 Million from care budgets on societal support services); via: http://www.binnenlandsbestuur.nl/financien/nieuws/gemeenten-houden-310-miljoen-over-van-wmo-budget.9533886.lynkx.

[7] The term 'legal instrument' in this paper is used to indicate several legal tools in hands of governments provided by regulation to organise services (or goods) in society, such as: subsidies, public contracts, authorisations. The term 'instrument' is used because of its meaning serving to achieve EU or national policy goals. Although it is possible to use these different instruments, every instrument has a particular aim, and, consequently a set of rules applicable to them. In this sense, legal instrument as a term is used regularly by Manunza to indicate the instrumental role of the regulation of 'public contracts' (see e.g: Elisabetta Manunza, Waarom minder competitie voor de inkoop van sociale diensten?' (translated title: Why less competition for the purchase of social services?), *Tijdschrift Aanbestedingsrecht*, December 2011, 6, pp. 431-438). Since the EU 2020 strategy, public procurement is identified by the EU as a market-based instrument for smart, sustainable and inclusive growth. As to the different legal instruments, other authors sometime use other names, such as legal arrangements or legal phenomena (C.J. Wolswinkel, Concession Meets Authorisation: New Demarcation lines under the Concessions Directive, *European Procurement & Public Private Partnerships Law Review* 2017/12, pp. 396-407; C.J. Wolswinkel, From public contracts to limited authorisations and vice versa: exploring general award requirements form the EU court's corollary approach, *Public Procurement Law Review* 2015/ 5, pp.137-163).

one or more market parties can be contracted (hereafter: public contracts).[8] Choosing the right legal instrument to effectively and efficiently organise these services is of utmost importance: the current challenges of the social sector, such as mentioned above, ask for sustainable solutions. The different instruments are, however, not clearly defined and tend to overlap, leading to legal uncertainty. Although it is mainly at the discretion of the individual Member States *how* to organise their social systems[9], EU law does take effect once a specific legal instrument is chosen. With regard to the choice for an instrument to organise social care services and the legal framework applicable to them, the discretionary room for Member States is limited by EU internal market law, in particular with regard to the free movement rules, public procurement law and state aid law.[10] Taking into account the specific character of the services, these regulatory frameworks do include specific regimes for social services.[11]

Recently, in 2016 and 2018, two judgements of the Court of Justice of the European Union (hereafter: CJEU) provided some clarification, which helps to distinguish between two of the available legal instruments: public contracts as meant by the EU Public Procurement Directive[12] and open award systems similar to authorisation schemes, that lead to contracts for pecuniary interest between a public authority and interested market parties (hereafter: 'open house systems').[13] In these cases, the Court ruled that the latter, although the way of organising constitutes a 'public contract' in the literal meaning of the definition of public contacts laid down in the Public Procurement Directive, it has not to be seen as such since it lacks a 'selection' among interested market parties, which is intrinsically linked to the EU Public Procurement Directive. Since then, in the Netherlands, this is seen as a new way of organising social care services – and, sometimes, as a chance to avoid EU public procurement law. Although the Court seems to provide clarification on one of the distinguishing elements of public contracts and other legal instruments, by delineating the scope of the Public Procurement Directive that this implies a selection between interested

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[8] Also explained in: Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, *SWD*(2013) 53 final/2; See about the choice for different legal instruments in the Netherlands: Elisabetta Manunza and Jan Telgen, 'Zorg inkopen kan anders dan aanschaf van rioolbuizen' (translated title: the purchase of social care differs from the acquisition of sewerage pipes), *Staatscourant* 6 juni 2017, p 8. See about the option of self- and in-house organisation: W.A. Janssen, Regulating the Pre-procurement Phase: Context and Perspectives. In Khi V. Thai (Ed.*), International Public Procurement - Innovation and Knowledge Sharing*, Springer International publishing 2015, pp. 221-236; Elisabetta Manunza and Wouter-Jan Berends, 'Social services of General Interest and the Public Procurement Rules', in: Ulla Neergaard, Markus Krajewski , Erika M. Szyszczak; J.W. van de Gronden (eds), *The Role of SSGIs in EU Law: New Challenges and Tensions*, The Hague, The Netherlands: T.M.C. Asser 2012, pp. 347-384.

[9] The European Union recognises the freedom of Member States to organise their social care services in their own appropriate way and respects the diversity of situations in the Member States. See more about the differences between Member States in: Pierre Bauby, Unity and Diversity of SSGIs in the European Union, in: Ulla Neergaard e.o. (eds.), *Social Services of General Interest in the EU*, The Hague: T.M.C. Asser Press 2013, p. 42 ff.

[10] It may be assumed that the way of organising social care services in the Netherlands is to be identified as providing economic activities which are subject to EU internal market law, see e.g. about the concept 'economic activity': SWD(2013) 53 final/2. See about the ambiguous concept 'economic activities': Dragana Damjanovic, The EU Market Rules as Social Market Rules: Why the EU can be a Social market economy, *Common Market Law Rev.* 2013 (5), pp. 1685-1718; Vassilis Hatzopoulos, The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities, *European Business Law Rev.* 2012, 23/6, pp. 973-1007.

[11] See e.g. in the Public Procurement Directive 2014/24/EU, art. 74 ff., which includes a specific regulation for social services and other specific services; And see: State Aid package for SGEIs.

[12] Both cases are ruled on the basis of Directive 2004/18/EC. However, it can be concluded that the ruling in these cases applies also to situations under the current Directive 2014/24/EU, see more in para. 4 of this paper.

[13] CJEU 2 June 2016, case C-410/14, ECLI:EU:C:2016:399, *Falk Pharma* and CJEU 1 March 2018, case C-9/17, ECLI:EU:C:2018:142, *Tirkkonen*.

market parties, at the same time its judgement leads to new questions about the dividing lines between public contracts and other legal instruments.

This paper discusses the dividing line between public contracts and the open house system and the questions that it brings to light. Due to the overlap between open house systems and 'normal' authorisation schemes, attention is firstly paid to the dividing line between public contracts and authorisations, which rests predominantly on the criterion 'pecuniary interest'. Secondly, the criterion of 'selection' is discussed on the basis of the judgements of the CJEU in the cases *Falk Pharma* and *Tirkkonen*. Thereafter, the paper delves into the consequences and new questions that have been the result of these judgments. Starting point of this paper is the situation in the Netherlands with regard to the organisation of social care services.

2. DISTINGUISHING PUBLIC CONTRACTS FROM AUTHORISATION SCHEMES: THE ELEMENT 'CONTRACTS FOR PECUNIARY INTEREST'

2.1. EU Public Procurement Directives: market based instrument for a sustainable Europe

Public contracts and authorisation schemes are different legal instruments, intended for other purposes and, therefore, governed by different legal frameworks. Aiming to establish the EU internal market for public contracts, the Public Procurement Directive makes very clear that every "public contract" above certain thresholds, must be awarded in accordance with the public procurement rules. Public contracts under the thresholds but with cross-border interest are only subject to the fundamental principles of the EU Treaties.[14] The definition of public contracts is laid down in art. 2 para. 5 Directive 2014/24/EU, where it reads:

> "*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services*".

Ensuing from the EU fundamental principles of non-discrimination, equality, and transparency, the Public Procurement Directives seeks to ensure the fair and equal competition between all interested undertakings for a public contract within the Union.[15] It forbids discriminatory behaviour by public authorities in the Member States, favouring national or local enterprises.

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[14] See i.a: CJEU 15 May 2008, joint cases C-147/06 and C-148/06, ECLI:EU:C:2008:277, *SECAP* and CJEU 14 November 2013, case C-221/12, ECLI:EU:C:2013:736, *Belgacom*. See more about the interstate requirement and EU objectives: Elisabetta Manunza and Linda Senden (eds.), *De EU: de interstatelijkheid voorbij?* (translated title: The EU: beyond the interstate requirement?), Oisterwijk (NL): Wolf Legal Publishers 2006.

[15] See e.g: CJEU 14 February 2008, case C-450/06, ECLI:EU:C:2008:91, *Varec SA* , para.34; CJEU 27 February 2003, case C-373/00, ECLI:EU:C:2003:110, *Adolf Truley GmbH*, para. 41; CJEU 12 December 2002, case C-470/99, ECLI:EU:C:2002:746, *Universale Bau e.o.,* para. 51. CJEU 18 June 2002, case C-92/00, ECLI:EU:C:2002:379, *HI*, para. 43; CJEU 1 February 2001, case C-237/99, ECLI:EU:C:2001:70, *Commission/France*, para.41; CJEU 3 October 2000, case C-380/98ECLI:EU:C:2000:529, *University of*

Additionally, it contributes to gaining the best value for money in the perspective of public authorities, and – increasingly - in the perspective of society as a whole.[16] The latter is especially important for social care services, as the users of the services are not the public authorities themselves, but the citizens in need of social care. In the EU Lisbon Treaty (2009), the internal market definition changed from an *open market economy with free competition* into a *social market economy*, in which a social element is added to the market economy. Since then, the interest of citizens as users –and (tax)payers - of the services have been put more central and may entail broader aspects than economic benefits only, such as innovation, sustainability and social considerations.[17] This broader focus was confirmed by the EU 2020 strategy to apply to the EU public procurement regulation, whereas public procurement was called a market-based instrument for smart, sustainable and inclusive growth in the EU. In the latest Public Procurement Directive 2014/24/EU, this broader focus is clearly anchored in the law, leaving room for considerations that in view of public authorities will create value that serves society as a whole. The importance of the broader objectives of public procurement law is also stressed more recently by communications of the EU Commission.[18]

With regard to the procurement of social care services, Directive 2014/24/EU in art. 74 until 77 introduces a specific regime for 'social and other specific services'. Member States are obliged to put in place national rules for the award of these contracts in which they must ensure that contracting authorities may take into account the specific needs of these services: the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Until now, however, the Dutch legislator did not spent much effort to implement a specific procedure for social services in the Dutch regulation, thereby leaving unused an opportunity for further

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Cambridge, para.16. See also in: E.R. Manunza, Is een zwarte lijst van bouwbedrijven verenigbaar met het Europees recht (translated title: Blacklisting construction companies in accordance wiht EU law?, *Bouwrecht* 40, 2003, pp. 747-757, p. 750.

[16] See more about the public procurement objectives and their instrumental function: Elisabetta Manunza and Wouter-Jan Berends, 'Social services of General Interest and the Public Procurement Rules', in: Ulla Neergaard, Markus Krajewski , Erika M. Szyszczak; J.W. van de Gronden (eds), *The Role of SSGIs in EU Law: New Challenges and Tensions*, The Hague, The Netherlands: T.M.C. Asser 2012, pp. 347-384; Ann-Marie Kühler and Elisabetta Manunza, 'Kansen bij de aanbestedingsregels' (translated title: Opportunities of public procurement), in: B. Hessel, A.M. Kühler, E. Perton, *Pluk de vruchten van de interne markt. Europees beleid als kans voor decentraal beleid*, Den Haag: Sdu Uitgevers 2011, pp. 103-137. About the discussion on the objectives of the Public Procurement Directives and their meaning, see i.a: Albert Sanchez-Graells, A deformed principle of competition?- the subjective drafting of Article 18(1) of Directive 2014/24, pp. 80-100, in: Albert Sanchez-Graells and Grith Skovgaard Ølykke, *Reformation or Deformation of the EU Public Procurement Rules*, Cheltenham/ Northampton: Edward Elgar Publishing 2016; Peter Kunzlik, Neoliberalism and the European Public Procurement Regime, pp. 283-356, In: Catherine Barnard, et a (eds.), *Cambridge Yearbook of European Legal Studies*, Vol. 15 2012-2013, Oxford and Portland, Oregan: Hart Publishing 2013; Sue Arrowsmith, Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies, *The 14 Cambridge Y.B. Eur. Legal, Stud. 1 (2011-2012)*. See especially about social services of general interest and the value of competition and the relevance of application of the (full) public procurement rules on social services in: E.R. Manunza, Waarom minder competitie voor de inkoop van sociale diensten?' (translated title: Why less competition for the purchase of social services?), *Tijdschrift Aanbestedingsrecht*, December 2011, 6, pp. 431-438.

[17] See e.g.: Elisabetta Manunza, De aanbesteding als hefboom (translated title: public procurement as a lever), *Tijdschrift Aanbestedingsrecht*, december 2011, afl. 6, pp. 415-419.

[18] See the three communications of 3 October 2017: Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Making Public Procurement work in and for Europe, *COM*(2017)572 final; Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects, *COM*(2017) 573 final; Commission Recommendiation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement Building an architecture for the professionalisation of public procurement, *OJ EU* L 259/28.

legal certainty and for creating a procedure within EU public procurement law that takes into account the specific needs of the social sector.[19]

However, EU public procurement law does not intend to cover all kinds of public activities. This is explained in in recital 4 of Directive 2014/14/EU, attempting to address delineation issues with other legal instruments:

"*the Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract*".
(…)
"*the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes* (…)."

As a consequence, public contracts must be distinguished from other legal instruments, such as authorisation schemes and subsidies. In order to be able to distinguish between authorisation schemes and public contracts, therefore, a dividing line must be established. First of all, public contracts, as in the Directive, are defined as 'contracts for pecuniary interest'. This can be seen as a main distinguishing element of the public contracts definition from other legal instruments. It should be noted here that other authors have indicated to prefer the element 'acquisition' from the definition of procurement in art. 1 para 2 directive 2014/24/EU as a better dividing line between legal instruments.[20] In terms of delineation issues with the other instruments, the public contracts definition of the Public Procurement Directive as cited above, must be seen as decisive. This approach is in line with the case law of the CJEU, who considers the substance of the activity or legal instrument and tests it to the definition of public contracts, in order to establish whether EU public procurement law is applicable, while referring to the general principle that the activity must be interpreted in such a way as to ensure that the Public Procurement Directive is given full effect.[21]

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[19] In the Dutch Public Procurement Act 2012, in art. 2.38 and 2.39, is laid down a certain procedure, however it does not include a further developed framework based on the needs as described.
[20] Roberto Caranta, The changes to the Public Contract Directives and the story they tell about how EU Law works, *Common Market Law Review* 2015/52, pp.391–460 at pp.433–436. Roberto Caranta, "General report" in Ulla Neergaard, Catherine Jacqueson and Grith Skovgaard Ølykke (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes*, Copenhagen: DJØF Publishing, 2014, p. 96; See more about the public contracts definition: Sue Arrowsmith, *The Law of Public and Utilities Procurement*, London: Sweet & Maxwell 2014, pp.388–398,
[21] See e.g.: CJEU 25 March 2010, case C-451/08, ECLI:EU:C:2010:168, *Helmut Müller*; CJEU 18 January 2007, case C-220/05, ECLI:EU:C:2007:31, *Auroux and Others*, see especially 29, 53/55, 58-68; CJEU 12 July 2001, case C-399/98, ECLI:EU:C:2001:401, *Ordine degli Architetti and Others*, see: para 52, 55, 85. See also: Christopher H. Bovis,"Public procurement in the EU: Jurisprudence and conceptual directions", *Common Market Law Rev*. 2012, 49, pp.247–290, p. 260; And see in relation to the concept of concessions: U. Neergaard, 'Public Service Concessions and Related Concepts – The Increased pressure from Community Law on Member Sates' use of Concessions', *Public Procurement Law Review* 2007, 397; See also: Roberto Caranta, "General report" in Ulla Neergaard, Catherine Jacqueson and Grith Skovgaard Ølykke (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes*, Copenhagen: DJØF Publishing, 2014, pp.79–175, p.87. A similar approach can be distilled from the case law establishing whether a national concept meets the definition of ' state aid' in relation to subsidies: E.R. Manunza, *EG*

2.2. The element 'contracts for pecuniary interest' as a main dividing line between authorisation schemes and public contracts

A 'contract for pecuniary interest', means (in a general sense) a performance for a consideration: the contracting authority which has concluded a public works contract receives a service or good pursuant to that contract in return for consideration.[22] This implies a certain reciprocity and *bilateralism*. It follows from the *Helmut Muller* case that this concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract: the 'contract for pecuniary interest' entails an obligation to complete the contract.[23] Additionally, such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.[24] On the basis of the cases *Scala*[25], *Auroux/Roanne*[26] and *ASL Lecce*[27] it can be concluded that the other part of the pecuniary nature, the consideration for the economic operator, is fulfilled where it is provided that an economic operator receives any financial benefit. The financial benefit can exist in a direct remuneration from the public authority, but could also consist of a remuneration of the costs of the raw- or other materials, waive of rental costs by the contracting authority or the entitlement to obtain income from third parties as consideration for the sale of the works executed.[28] In the case, *ASL di Lecce* the CJEU explains that a public act cannot fall outside the concept public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service. The latter element can be of importance to establish the dividing line between subsidies and public contracts. It can be concluded on the basis of the case law of the CJEU, the element 'pecuniary interest' is fulfilled soon.

Authorisations have as their main characteristic that they lack the reciprocity of public contracts. These instruments are not to be seen as 'contracts for pecuniary interest'. This is confirmed by the definition laid down in the EU Services Directive, where authorisations are defined as:

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aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit (diss. Amsterdam) (translated title: EC public procurement issues by privatization and by combatting corruption and organised crime), Deventer: Kluwer 2001, p. 120-122.

[22] CJEU 25 March 2010, case C-451/08, ECLI:EU:C:2010:168, *Helmut Müller*, para. 46-49. See into more detail on the element of 'pecuniary interest': Christopher.H. Bovis,"Public procurement in the EU: Jurisprudence and conceptual directions", *Common Market Law Rev*. 2012, 49, pp.247–290, 260–264.

[23] *Helmut Müller*, para. 59-63.

[24] See for the meaning of this element: *Helmut Müller*, para. 49-54.

[25] CJEU 12 July 2001, case C-399/98, ECLI:EU:C:2001:401, *Ordine degli Architetti and Others,* para 76-85.

[26] CJEU 18 January 2007, case C-220/05, ECLI:EU:C:2007:31, *Auroux/Roanne* para. 45.

[27] CJEU 19 December 2012, case C-159/11, ECLI:EU:C:2012:817, *ASL Lecce,* para. 29.

[28] *Auroux/Roanne* para. 45. The latter might be a concession contract as is explained in: *Helmut Müller*, para. 71.

> "*any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof*".[29]

A main characteristic of authorisation schemes is that they entail a right or permission to engage in a certain economic activity otherwise prohibited, without the obligation to perform.[30] Authorisations should be considered unilateral legal acts of public authorities in order to regulate certain activities. This does not, in principle, include contracts for pecuniary interest as meant by the definition of public contracts in the Public Procurement Directive. Distinguishing concessions from authorisations, the CJEU in the *Belgacom* judgment confirmed as a demarcation criterion the element of the pecuniary interest, whether or not the economic operator is obliged to engage in the activity involved.[31].

The urge to regulate authorisation schemes do touch upon the same EU-internal market objectives as the Public Procurement Directive, although in a different way. Important for authorisation schemes is that they constitute a barrier to freely carry out activities in the Member States. Setting up an approval system, on the basis of which an activity can be executed only after receiving a permit, in principle impedes the free movement rules of art. 28 (goods), art. 49 (establishment) and/or 56 (services) of the Treaty on the Functioning of the EU (hereafter: TFEU). This means that authorisation schemes as far as they restrict the free movement rules[32], must be justified either by the exceptions formulated in the Treaty[33], or by certain overriding reasons in the public interest recognised by the CJEU in its case law.[34] The boundaries of authorisation schemes have been further developed in case law of the CJEU. It has been common jurisprudence of the CJEU that a prior administrative authorisation scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom, such as the free movement of services. If a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known

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[29] Art. 4, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ EU,* L 376/36.

[30] See for more characteristics of the authorisation also the recitals of the Directive concerning concessions 2014/23/EU, para 14. And see: C.J. Wolswinkel, From public contracts to limited authorisations and vice versa: exploring general award requirements form the EU court's corollary approach, *Public Procurement Law Review* 2015/ 5, pp.137-163.

[31] CJEU 14 November 2013, case C-221/12, ECLI:EU:C:2013:736, *Belgacom*; and see: C.J. Wolswinkel, Concession Meets Authorisation: New Demarcation lines under the Concessions Directive, *European Procurement & Public Private Partnerships Law Review* 2017/12, pp. 396-407, p.399.

[32] In case of a cross-border interest. The CJEU judgement of 30 January 2018, case C-360/15, ECLI:EU:C:2018:44, *X,* seems to add to this that even in an internal situation where all the relevant elements are confined to a single Member State, authorisation schemes must comply with the specific conditions of chapter III of Directive 2006/123

[33] See art. 52 TFEU (Establishment), which also art. 62 TFEU (Services) is referring to for exemptions from the free movement of services.

[34] See e.g.: CJEU 20 February 1979, case 120/78, ECLI:EU:C:1979:42, *Cassis de Dijon;* CJEU 19 June 2008, case C-219/07, ECLI:EU:C:2008:353, *Andibe*l (free movement of goods); CJEU 3 October 2000, case C-58/98, ECLI:EU:C:2000:527, *Corsten*; CJEU 9 November 2006, case C-433/04, ECLI:EU:C:2006:702, *Commission/Belgium*; CJEU 18 July 2007, case C-490/04, ECLI:EU:C:2007:430, *Commission/Germany* (free movement of services).

in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.[35] More specifically, regarding social services of general interests, the EU Commission confirms that the Court ruled that such market regulating measures must be based on objective, non-discriminatory criteria which are known in advance so as to support the exercise of the national authorities' powers of appraisal.[36] It adds that in order to be compatible with EU law, these measures must also be proportionate and that the opportunity for access to an adequate recourse has to be guaranteed.[37] Specific regulation with regard to the freedom to provide services, which includes the exercise of the freedom of establishment for service providers and the free movement of services, is laid down in the Services Directive.[38]

Considering the fact that the organisation of social care services in the Netherlands often requires an performance obligation (an obligation to provide the service) – since it is a statutory duty of the government to organise a certain standard of care for its citizens -, the conclusion could be that this always leads to a fulfilling of the element 'contracts for pecuniary interest', and therefore, usually is to be identified as a public contract as meant by the Public Procurement Directive. However, this conclusion takes not into account the possibilities to organise social care services by authorisation schemes including an obligation to complete. As referred to regularly by the European Commission in it communications[39] and mentioned in the recitals of Directive 2014/24/EU, 'Member States and public authorities remain free to organise social services in a way that does not entail the conclusion of public contracts, (…) for example (..) by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority(…)'.[40] In that regard, the EU Commission prescribes as a condition for using an authorisation scheme, that providers which have obtained an authorisation, *must* provide the service at the request of the user (italics G.B.). Therefore, the obligation to perform, constituting the pecuniary nature, would be present when using an authorisation for the organisation of social care services.

Interpretative guidance is found in the two recent cases of the CJEU *Falk Pharma* and *Tirkkonen*, in which the Court ruled that the element 'selection' between interested market parties must be seen as an element

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[35] See e.g.: CJEU 20 February 2001, case C-205/99, ECLI:EU:C:2001:107, *Analir a.o.*, para. 37 en 38, CJEU 13 May 2003, case C-385/99, ECLI:EU:C:2003:270, *Müller-Fauré and Van Riet* para. 84 and 85; CJEU 10 March 2009, case C-169/07, ECLI:EU:C:2009:141, *Hartlauer*, para. 64; CJEU 22 December 2010, case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab*, para. 53. And see: CJEU 9 September 2010, case C-64/08, ECLI:EU:C:2010:506, *Ernst Engelmann*, para. 55; 3 June 2010, case C-203/08, *Betfair* ECLI:EU:C:2010:307, para.50. CJEU 8 September 2010, case C-46/08, ECLI:EU:C:2010:505, *Carmen Media Group Ltd.*, para. 87.

[36] It can be questioned whether the Commission with the words 'so as to support" would hint that these criteria would even help the national authorities in using their discretionary power. However, in Dutch it says literally translated: "*to limit* the exercise of the national authorities' powers of appraisal (italics author)".

[37] Communication from the Commission, Implementing the Community Lisbon programme: Social services of general interest in the European Union, *COM*(2006) 177 final. With regard to the requirement of providing the opportunity for access to an adequate recourse, the Commission refers to: CJEU 20 February 2001, case C-205/99, ECLI:EU:C:2001:107, *Analir*.

[38] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ EU,* L 376/36.

[39] Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, *SWD*(2013) 53 final/2, Q&A no. 216. And see: Communication from the Commission, Implementing the Community Lisbon programme: Social services of general interest in the European Union, *COM*(2006) 177 final, p.9.

[40] Rec.114, Directive 2014/24/EU.

intrinsically linked to the EU public procurement regulation.[41] In a way, this leads to a 'new' instrument in between 'normal' authorisation schemes and public contracts, because it entails an authorisation scheme for the award of public contracts in the literal definition of the Public Procurement Directive (it includes contracts for pecuniary interest). Consequently, the element 'contracts for pecuniary interest' seems less decisive for delineating the public contracts definition.

3. THE ELEMENT 'SELECTION' AS EXPLAINED IN THE CASES *FALK PHARMA* AND *TIRKKONEN*: DISTINGUISHING OPEN HOUSE SYSTEMS FROM PUBLIC CONTRACTS IN THE MEANING OF THE EU PUBLIC PROCUREMENT DIRECTIVE

3.1. The Dutch "open house model" on the basis of the Falk Pharma case

Since the judgement of the CJEU in the *Falk Pharma* case (2016), the open house system, with characteristics of a 'normal' authorisation scheme but leading to public contracts as meant by the literal definition of public contracts, is now of interest to Municipalities in the Netherlands, when externalising social care services.

In the *Falk Pharma* case[42], DAK, a German statutory Health Insurance Fund published in the supplement to the Official Journal of the European Union a notice concerning an 'authorisation procedure' for the conclusion of rebate contracts with undertakings marketing a medicinal product whose active ingredient is mesalazine (used to treat inflammatory bowel disease). This procedure comprised a contract scheme, through which DAK intended to acquire goods on the market by contracting throughout the period of validity of that scheme with any economic operator who undertakes to provide the goods concerned on fixed terms, without choosing between the interested operators, and allowing those operators to accede to that scheme throughout its period of validity.[43] The importance for market parties to have this contract follows from the German Social Security Code, in which it is prescribed that, in the case of the supply of a medicinal product which has been prescribed by indicating its active ingredient and whose replacement by a medicinal product with an equivalent active ingredient is not excluded by the prescribing doctor, pharmacists must replace the medicinal product prescribed with another medicinal product with an equivalent active ingredient in respect of which a rebate contract has been concluded.[44]

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[41] CJEU 2 June 2016, case C-410/14, ECLI:EU:C:2016:399, *Falk Pharma*, para.38 ; confirmed in: CJEU 1 March 2018, case C-9/17, ECLI:EU:C:2018:142, *Tirkkonen*.

[42] CJEU 2 June 2016, case C-410/14, ECLI:EU:C:2016:399, *Falk Pharma*. See for a more comprehensive review of this case and the implications for social care services procurement (in Dutch): G.Bouwman, Een open toetredingssysteem zonder selectie: een nieuwe rechtsfiguur die buiten de werkingssfeer van de aanbestedingsrichtlijnen valt?, *Jurisprudentie Aanbestedingsrecht (JAAN)* 2016, 13 (8), pp. 908-916.

[43] *Falk Pharma*, para 32. See in other words para 14.

[44] *Falk Pharma*, para.11.

The notice in the Official Journal indicated that the procedure was not subject to EU public procurement law. In the proceedings before the Court, certain interested parties including Falk Pharma, argued that such a scheme leads to the conclusion of contracts for a pecuniary interest in the sense of the definition of 'public contracts' in the Public Procurement Directive, and, therefore, public procurement law had to be applied.[45] Consequently, Falk Pharma maintained that a call for tenders was required, which implies the conclusion of exclusive contracts.[46]

The CJEU takes first into consideration very precisely the substance of the authorisation procedure and admits that, indeed, such a scheme leads to the conclusion of contracts for a pecuniary interest between a public entity and economic operators which corresponds to the definition of 'public contracts' as laid down in the Public Procurement Directive. However, it then considers that although the elements of the definition of public contracts are fulfilled, another intrinsically linked element of the concept public contracts is missing: there was no 'selection' between interested operators. In that regard, the Court ruled:

> "*the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of 'public contract' within the meaning of Article 1(2) of that directive*".[47]

Interestingly, the CJEU comes to this conclusion after referring to the fact that the definition of 'public contracts' must be explained in light of the principles of the TFEU - in particular the principles of the free movement of goods, freedom of establishment and freedom to provide services and the principles that derive therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency to which the award of public contracts in Member States are subject. In addition, it emphasizes that the definition has to be read in conjunction with the purpose of the EU Public Procurement Directive, as it is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.[48] In a scheme such as in this case, according to the CJEU, there is no favouring of national tenderers, because a contract is concluded with all interested operators wishing to supply the goods concerned in accordance with the conditions specified by that entity.[49] Hence, there is no need to control, through the detailed rules of the Public Procurement Directive, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators.[50]

'Selection', as an element of public contracts, can also be distilled from the recitals of the Public Procurement Directive 2014/24/EU, where it says that situations where all operators fulfilling certain

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[45] *Falk Pharma*, para 34.
[46] *Falk Pharma*, para.18.
[47] *Falk Pharma*, para. 38
[48] *Falk Pharma*, para. 35 and the CJEU refers to CJEU 10 November 1998, case C-360/96, EU:C:1998:525, *BFI Holding*, para. 41 and 42.
[49] *Falk Pharma*, para. 37 in particular.
[50] *Falk Pharma*, para. 37.

conditions are entitled to perform a given task, *without any selectivity*, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (*italics author*).[51] However, the words 'entitled to perform a given task' could still be interpreted as requiring the lack of an obligation to perform - which existence on the contrary was deemed to fulfil often the elements of public contracts governed by public procurement law –see para. 2 of this paper. On this point, the guidelines of the EU Commission do not give further clarification.[52] The CJEU in *Falk Pharma* and the Advocate-General in *Tirkkonen* distil this element 'selection' of public contracts also from the definition of 'procurement' laid down in art. 1 para. 2 Directive 2014/24, as it says (..)'*from economic operators chosen by those contracting authorities'*(…)(emphasize added). On this basis, it may be concluded that the closing of contracts for pecuniary interest for the provision of social care services without making a selection, can be awarded through an open house system, similar to 'normal' authorisation schemes – see however about the questions left open in that regard in para. 4 of this paper. Since the system is not to be qualified as an authorisation scheme in its pure form, whilst constituting contracts for pecuniary interest, this legal instrument in the Netherlands is now referred to as the "open house model".

3.2. Further clarification on the element 'selection' on the basis of the case Tirkkonen

On March 1st of 2018, the CJEU ruled again on whether an open house system entails the award of public contracts as meant by the EU Public Procurement Directive.[53] In its considerations, the CJEU in *Tirkkonen*, seems to give further explanation on the element 'selection' as it seems to reveal that this in fact means that a comparison and classification must be made amongst interested market parties – thus, selection would mean applying award criteria.

In this case the public authority, an Agency for Rural Affairs in Finland had launched a tender procedure in order to conclude contracts for advisory services by a framework agreement, under the Neuvo 2020 Farm Advisory Scheme, for the period from 1 January 2015 to 31 December 2020. Its aim was to set up a large pool of advisers who must fulfil a number of conditions.[54] The advisory services referred to in the contract notice were intended to be offered to farmers and other land managers who had entered into an environmental agreement concerning the payment of environmental compensation payments. Farmers who fulfil that condition and who wish to request advice are free to contact an advisor of their choice, who is a member of the Neuvo 2020 Farm Advisory Scheme. That advisor is then paid according to the work carried

[51] Recitals, para. 4 Directive 2014/24/EU. Indirectly, this can be derived from the European Commission communications, see: *SWD*(2013) 53 final/2, Q&A no. 216.
[52] Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD(2013) 53 final/2, Q&A no. 216. And see: Communication from the Commission, Implementing the Community Lisbon programme: Social services of general interest in the European Union, *COM*(2006) 177 final, p.9.
[53] CJEU 1 March 2018, case C-9/17, ECLI:EU:C:2018:142, *Tirkkonen*
[54] *Tirkkonen*, para. 33.

out, by way of an hourly rate excluding value added tax (VAT) paid by the Agency, the farmer only bearing the amount of VAT.[55]

The case was brought before the Court by one of the interested advisers, Ms Tirkkonen, who was not admitted to accede the Advisory Scheme.[56] She was excluded on the ground that she had not completed point 7 of the tender form, in which the service provider must indicate whether he accepts the terms of the draft framework agreement, by ticking the 'yes' box or the 'no' box. Considering that it was imperative to accept the terms of that draft framework agreement, the Agency, rejected Ms Tirkkonen's application and did not authorise her to adjust her tender by marking the box 'yes' in point 7 of that form. Therefore, Tirkkonen challenged that decision before the Court in order to obtain the right to complete her tender documents and to fill out point 7 of that form. To that end, she alleged that the invitation to tender at issue in the main proceedings constituted a licensing scheme and was therefore not covered by the concept of a public contract. Accordingly, she argued that she should have been allowed to complete her bid.

In *Tirkkonen*, the Court, firstly, confirms some of the considerations of the *Falk Pharma* case, while referring to this case. It recognises again, that the (advisory) scheme leads to the conclusion of contracts for a pecuniary interest between a public entity, which could be a contracting authority within the meaning of Directive 2004/18, and economic operators whose objective is to supply services, which corresponds to the definition of public contracts laid down in Article 1(2)(a) of that directive.[57] It then, however, repeats that public contracts include a 'selection' among interested market parties. The objective of Directive 2004/18 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities.[58] According to the Court, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators. [59]

In support of this conclusion, the Court cites from *Falk Pharma*:

> *the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of 'public contract' within the meaning of Article 1(2) of that directive.*[60]

In *Tirkkonen*, then, the Court further clarifies the element of 'selection'. In *Falk Pharma*, that included rebate contracts for a specific medicinal product, the contract scheme seemed very similar to a 'normal'

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[55] *Tirkkonen*, para. 15.
[56] *Tirkkonen*, para. 18-19.
[57] *Tirkkonen*, para. 28.
[58] *Tirkkonen*, para. 29.
[59] *Tirkkonen*, para. 31 and 41.
[60] *Tirkkonen*, para. 30. And see *Falk Pharma*, para. 38.

authorisation scheme and no further questions were posed about the element 'selection'. In *Tirkkonen* the scheme seemed to include a more comprehensive system for advisory services, in which, apparently, it was necessary to further assess the suitability of interested market parties – in this case also tested by an examination.[61] Therefore, the Agency in the *Tirkkonen* case organised a tender procedure, in which the criteria for being admitted to the contract scheme were laid down in the draft framework agreement as criteria for selection. The referring court points out in that regard that although the number of providers eligible to join the framework agreement is not limited in advance in the tender documents, it is factually limited by means of the obligation to fulfil those requirements.[62] It is therefore necessary, in this case, that the Court further determines the used criteria for the selection of market parties in order to establish whether the Agency has chosen a tender from among all those which satisfied the conditions it had laid down in its invitation to tender[63] – i.e. whether a 'selection' is made in the meaning of the Public Procurement Directive.

Similar to the *Falk Pharma* case, the CJEU also concludes in this case that the system in *Tirkkonen* lacks the criterion of 'selection'. In *Tirkkonen*, the Court, however, in its considerations seems to give a further explanation of the element 'selection' as it seems to reveal that this in fact means that a comparison and classification must be made among interested market parties – thus, selection means applying award criteria. The Court rules, that "in the present case", the decisive factor is that the contracting authority has not referred to any award criteria for the purpose of comparing and classifying admissible tenders:

> *In the absence of that factor, which is, as is apparent from paragraph 38 of the judgment of 2 June 2016, Falk Pharma (C-410/14, EU:C:2016:399), intrinsically linked to the regulation of public contracts, a farm advisory scheme, such as that at issue in the main proceedings, cannot constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18.*[64]

The Agency that organised the tender, admitted all the candidates who satisfied the requirements, and therefore it confined itself to ensuring that qualitative criteria were respected.[65] In that respect, the examination requirement cannot be seen as an award criterion.[66] Additionally, the fact that the system was not permanently open to interested economic operators does not mean, according to the Court, that in this advisory scheme a 'selection' is made among interested market parties as meant by EU public procurement law.[67]

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[61] See e.g. *Tirkkonen*, para. 16-17.
[62] *Tirkkonen*, para. 23.
[63] *Tirkkonen*, para. 32.
[64] *Tirkkonen*, para. 35.
[65] *Tirkkonen*, para. 33.
[66] See *Tirkkonen,* para. 37: Criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' suitability to perform the contract in question, cannot be regarded as 'award criteria'. The CJEU refers to the *Lianakis* Judgement (CJEU 24 January 2008, C-532/06, EU:C:2008:40) and the *Ambisig* Judgement (CJEU 26 March 2015, C-601/13, ECLI:EU:C:2015:04) because of questions of the referring court and explains the difference of the circumstances in the latter case (para 39).
[67] *Tirkkonen*, para. 35.

4. IMPLICATIONS AND FURTHER DELINEATION QUESTIONS ON THE DEMARKING LINE "SELECTION" FOR THE ORGANISATION OF SOCIAL CARE SERVICES IN THE NETHERLANDS

Although the *Falk Pharma* and *Tirkkonen* cases concern a different type of goods and services, respectively (rebate contracts for) medicinal products and farm advisory services, these cases, in the Netherlands, are mainly observed to create new opportunities for the organisation of social care services.
In *Falk Pharma*, it is ruled that a selection among interested market parties as an element, is intrinsically linked to EU public procurement law. The *Tirkkonen* case allows for the conclusion that this means that the contracting authority must refer to any award criteria for the purpose of comparing and classifying admissible tenders –further delineating the scope of the public procurement regulation. It may even be concluded on the basis of this case that without making that selection, it is not allowed to follow the detailed rules of the public procurement regulation.[68] This may depend on the rules that are applicable to this systems (discussed hereafter). It must be pointed out here, however, that both cases concern a situation under Directive 2004/18. It is plausible that this is also true for Directive 2014/24/EU, being aimed at the same objective to prevent from discriminatory and unequal treatment among interested operators in the award of public contracts.

With regard to the situation in the Netherlands it could be concluded that this means that the systems used in practice that are also showing a similar kind of openness, even apart from the 'open house model' that is created deliberately as an option on the basis of Falk Pharma, do not fall under the EU Public Procurement Directive [69] – although it in principle includes the award of public contracts in the literal definition of this concept in the Directive.
However, it is important to dedicate a number of comments on these cases, that could have implications for the use of (and the rules applicable to) open house systems in other situations. As discussed, it is particularly relevant for the organisation of social care services in the Netherlands, because it leaves open a number of questions and brings forward new delineations issues, which leads to legal uncertainty in practice.

First of all, it is not clear what exactly is the difference between an open house system and a framework agreement as meant by the EU Public Procurement Directive. Both are aimed to a closing of contracts for pecuniary interest with more than one economic operators, in which later in the procedure a choice is made for one of the operators. In *Falk Pharma*, the Court considers that it is the permanent availability of the system for the duration of its validity to interested operators that suffices to distinguish that scheme from a

[68] *Tirkkonen*, para. 31 en 41.
[69] See for an analysis (in Dutch) of the percentages from 2017 about the (increased) use of certain open models by Municipalities, in: Niels Uenk, 'Inkooppraktijk WMO bij gemeenten krijgt steeds meer vorm: Transformatie in uitvoering', *Deal!*, October 2017, pp. 34-37.

framework agreement.[70] Interestingly, the referring court in *Falk Pharma* points out that imposing such a restriction on an authorisation procedure by fixing a time limit beyond which an operator can no longer accede to a rebate contract scheme would have a discriminatory effect since it would give a competitive advantage to operators who had acceded to that scheme.[71] In *Tirkkonen*, the Court held it to be irrelevant for the question whether there is a 'selection' as meant by the Public Procurement Directive that the framework agreement was not permanently open to interested economic operators.[72]

In *Tirkkonen*, it seems that the difference can be distilled from the question whether the public authority makes a comparison and classification of admissible tenders. If, therefore, a public authority does aim to select from the admissible tenders one or more contracting parties, at the same time excluding interested parties who can fulfil the necessary requirements for the services delivery, this is to be seen as a public contract in the meaning of the EU Public Procurement Directive. In the same way, it should be considered a 'selection' as meant by this regulation if a public authority uses a higher quality standard than necessary for the service provision, aiming to limit the number of contracting parties, and thereby needing a comparison and classification of interested market parties. It is a public contract in that sense as well, if the necessary requirements for admission to the system are aimed at making a comparison and classification among tenders as meant in the *Ambisig* case[73], a case in which the quality of the performance of the contract depended decisively on the 'professional merit' of the people entrusted with its performance.[74]
It can be concluded that using an open house system, for example for the organisation of social care services in the Netherlands, needs a careful investigation of the objectives of the public authority and, relating to that, the applied criteria to realise that objective.

A second issue relates to whom is choosing or selecting the eventual market parties for delivering the service. Delegating the choice for a product or a provider of the services to a third party or the user of the service, does not always mean that the public authority has no role in the award of the contract. Illustrative is the situation, which is not unusual in the organisation of social care services in the Netherlands, in which the services are awarded without a selection between interested care providers, but the service provision is evaluated by the users of the service, and the evaluations about the performance of a service provider are published so that users can depend their choice for a service on this evaluation. It seems that although in first instance no selection is made, it includes a certain comparison and classification by a public authority.
In addition, it is interesting that both in *Falk Pharma* and *Tirkkonen*, the choice was made by third parties, respectively pharmacists and patients and farmers. It can be questioned, therefore, whether these kind of systems can be used only for goods and services chosen by third parties or that this also can be used for

[70] *Falk Pharma*, para. 41.
[71] *Falk Pharma*, para. 29.
[72] *Tirkkonen*, para. 35.
[73] CJEU 26 March 2015, case C-601/13, EU:C:2015:204, *Ambisig*. In *Tirkkonen* the Court ruled that the *Ambisig* case was a different situation than in *Tirkkonen*. However, this can be different in other situations..
[74] *Tirkkonen*, para. 21 (referring court) and *Tirkkonen*, para. 38-39 (CJEU considerations).

services whereby the choice is made by an individual who has a certain connection with the government – for example an open house system for interpretation services for judges, in which the choice is made by an employee affiliated to a public authority, in this example: the judge.

Next to this, it is important to clarify that open house systems must comply to the conditions that indeed guarantee the openness of the system – similar to authorisation schemes. This is confirmed by the EU Commission guidelines and the recitals of the Public Procurement Directive 2014/24, explaining the conditions for authorisation schemes for social care services. They both prescribe as strict conditions that the system does not specify any limits or quotas concerning the number of service providers, all those meeting the conditions can participate; it must include pre-established conditions by the public authority; and the system must ensure sufficient advertising and be in compliance with the principles of transparency and non-discrimination.[75] Only the guidelines add as a condition that in this system, providers which have obtained a licence or authorisation, must provide the service at the request of the user, who will thus have the choice of several providers, at a price set beforehand by the public authority. Therefore, it seems that it is not allowed to apply a higher quality standard than necessary for the service delivery in these open house systems.
A practical question that can be raised here, is whether an infinite number of market parties is possible or desirable for any kind of acquisition of goods or services; for example, if they have to be monitored on performance and quality, which is very important in social care services.

Additionally, it is becoming more important to clarify the conditions justifying such a system. In that regard, it must be realised that the use of authorisation schemes is subject to EU internal market law, guaranteeing that the market is equally accessible for all interested entities within the European Union. This legal framework will be applicable to open house systems as well. In *Falk Pharma* the CJEU emphasizes that schemes as at issue, which are not subject to the EU Public Procurement Directives, are subject to the fundamental rules of the TFEU Treaty, in so far as its subject matter is of certain cross-border interest.[76] In particular, the CJEU refers to the principles of equal treatment and of non-discrimination between economic operators and the consequent obligation of transparency, that obligation requiring that there be adequate publicity.[77] Transparency requires publicity which allows potentially interested economic operators to apprise themselves properly of the conduct and the essential characteristics of an authorisation procedure as used in the specific case.[78] It does not specify, however, that authorisations – leaving aside the exemptions - are governed by the Services Directive 2006/123, including specific conditions to the award of authorisations, and have to be arranged in accordance with the case law of the CJEU regarding the free

[75] Commission Staff Working Document, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, *SWD*(2013) 53 final/2, Q&A no. 216. Recitals Directive 2014/24/EU, para. 114.
[76] *Falk Pharma*, para. 44.
[77] *Falk Pharma*, para. 44.
[78] *Falk Pharma*, para. 45.

movement of services. These regulatory requirements are very important to justify the use of authorisation schemes in fist instance and to prevent from arbitrary behaviour of public authorities.[79]
Possibly, the judgement of 30 January 2018 of the CJEU[80] adds to this that even in an internal situation i.e. a situation where all the relevant elements are confined to a single Member State, authorisation schemes must comply with the specific conditions of chapter III of Directive 2006/123; this would mean that the cross-border interest as a boundary mentioned in the *Falk Pharma* case, becomes irrelevant.
This regulation leads to the conclusion, as can be derived from CJEU case law, that a system that is not permanently open to interested economic operators, like in the case *Tirkkonen*, is an impediment on the free movement rules, that needs a justification; and that this will have consequences for the duration of the scheme: the market has to be opened up again for new interested and competent and potential 'better' market parties.[81]

Finally, these judgements must not divert the attention from the objectives and potential of the EU Public Procurement Directive as an instrument to tackle EU challenges, that influences the organisation of services in the social sector. Withdrawing social services from competition may hinder the well-functioning of EU- and National markets, and the economic and financial potential this could have. The importance of that only increases if we consider the opening up of the EU internal market having broader objectives, such as to gain best value for money, the prevention from corruption and cartels, lower prices, better quality of social care services, enlarging innovation and sustainability.[82]

5. CONCLUSION

Member States are free to choose between different instruments to externalise social care services. However, once the elements of the public contracts definition of the EU Public Procurement Directive are fulfilled, they must be awarded in accordance with that regulation in order to achieve the objectives of that regulation. Therefore a proper delineation of the legal instrument 'public contract' as meant by Directive 2014/24/EU is necessary. It becomes clear that a distinction between legal instruments is important. Both for subsidies and authorisation schemes, as legal instruments, the element important to distinguish them from public contracts is the element 'contract for pecuniary interest' – which element both instruments, in principle are lacking.

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[79] See about that in para. 2 of this paper.
[80] CJEU 30 January 2018, case C-360/15, ECLI:EU:C:2018:44, *X*.
[81] In *Tirkkonen* the validity of the contract was a period of 6 years, see para. 13. The CJEU in *Tirkkonen* calls this a 'limited' validity period, para 26 and 41. See e.g.: CJEU 9 March 2006, case C-323/03, *Commission/Spain*, (para. 44) en CJEU 9 September 2010, case C-64/08, ECLI:EU:C:2010:506, *Ernst Engelmann*. For authorisation schemes under Directive 2006/123 it is regulated that the duration may not be limited, unless the situations mentioned in art. 11.
[82] Elements of the instrumental role of public procurement, mentioned by Manunza in e.g.: Elisabetta Manunza, Waarom minder competitie voor de inkoop van sociale diensten?' (translated title: Why less competition for the purchase of social services?), *Tijdschrift Aanbestedingsrecht*, December 2011, 6, pp. 431-438, p. 432. And see: Elisabetta Manunza, De aanbesteding als hefboom (translated title: public procurement as a lever) , *Tijdschrift Aanbestedingsrecht*, december 2011, afl. 6, pp. 415-419, p. 419.

Recently the CJEU explained another element intrinsically linked to the EU Public Procurement Directive: the 'selection' between interested market parties, which according to the CJEU in *Tirkkonen* must be seen as to entail a comparison and classification of the economic operators in order to award the contract exclusively to one or more of them. Without this element a public activity is not to be seen as a public contract in the meaning of the EU Public Procurement Directive. This, however, brings new delineation issues and questions that needs clarification. Moreover, it requires further thoughts about the scope of EU public procurement law and the best ways to tackle the current global challenges.